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Abdul Mazid v Public Prosecutor

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COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO N-05–386–12 OF 2014
TENGKU MAIMUN, AHMADI ASNAWI JJCA AND KAMARDIN HASHIM J
5 FEBRUARY 2016

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Criminal Law — Murder — Defence of provocation — Appellant charged with offence of murder under s 302 of the Penal Code — Appellant convicted of offence and sentenced to death — Whether defence of grave and sudden provocation applied — Penal Code ss 300 & 302

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The appellant was charged with the offence of murder of one Mofiz Ali bin Asmot Ali ('the deceased') under s 302 of the Penal Code. The prosecution relied on the evidence of the appellant's co-worker ('PW4'), the lorry driver ('PW5'), and the pathologist ('PW2'). The incident occurred in a palm oil plantation where both the appellant and the deceased were working. PW4 testified that he saw the appellant hitting the deceased with the iron loading stick on the head and the deceased suffered serious injuries to his face and he died at the scene. PW5 testified that he heard loud argument between the appellant and the deceased whereas PW2 confirmed that the cause of death of the deceased was the serious injuries to the face. In defence, the appellant contended that he had no intention to kill the deceased and that the death of the deceased was accidental. The appellant also raised the defence of grave and sudden provocation. At the end of the trial the learned trial judge found that the prosecution had proved its case beyond reasonable doubt. The appellant was thus convicted and sentenced to death. Aggrieved by the decision, the appellant filed the present appeal. The sole issue for consideration was whether the defence of grave and sudden provocation applied.

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Held, dismissing the appeal and affirming the conviction and sentence of the High Court:

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(1) The court agreed with the findings of the learned trial judge that from the evidence of PW4, the prosecution had proved that the appellant did the act which caused the death of the deceased. With regards to evidence of PW2 on the nature of injuries found on the deceased, the learned trial judge was correct to hold that the said act was done with the intention of causing bodily injury which injuries were sufficient in the ordinary course of nature to cause death. Further, from the evidence of PW4 who saw the appellant repeatedly hitting the face of the deceased with the iron loading

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A stick, the court found that the injuries present on the deceased was the injury that was intended by the appellant (see paras 19–20).

(2) In the instant appeal, from the evidence of PW2 on the nature of injuries sustained by the deceased, the learned trial judge had made a correct finding that the injuries inflicted on the deceased was not proportionate to the provocation, if at all, the appellant was provoked by the deceased. Further, there was absolutely no evidence led by the appellant as to how or why he was provoked such that he lost his self-control and what had induced him to do what he did to the deceased. Therefore, there was no merits in the appeal (see paras 26 & 28).

[Bahasa Malaysia summary

Perayu telah dituduh kerana kesalahan membunuh Mofiz Ali bin Asmot Ali ('si mati') di bawah s 302 Kanun Keseksaan. Pendakwaan bergantung kepada keterangan rakan sekerja perayu ('PW4'), pemandu lori ('PW5'), dan ahli patologi ('PW2'). Kejadian itu berlaku dalam ladang kelapa sawit di mana kedua-dua perayu dan si mati bekerja. PW4 memberi keterangan bahawa dia melihat perayu memukul si mati dengan sebatang besi di kepala dan si mati mengalami kecederaan teruk di mukanya dan dia meninggal dunia di tempat kejadian. PW5 memberi keterangan bahawa dia mendengar pergaduhan yang bising di antara perayu dan si mati manakala PW2 mengesahkan bahawa sebab kematian si mati adalah kecederaan serius di muka. Dalam pembelaan, perayu berhujah bahawa dia tiada niat untuk membunuh si mati dan kematian si mati adalah satu kemalangan. Perayu juga menimbulkan pembelaan provokasi yang membahayakan dan tiba-tiba. Di akhir perbicaraan hakim perbicaraan yang bijaksana mendapati bahawa pendakwaan telah membuktikan kesnya melampaui keraguan munasabah. Perayu dengan itu disabitkan dan dijatuhkan hukuman mati. Terkilan dengan keputusan itu, perayu memfailkan rayuan ini. Satu-satunya isu untuk dipertimbangkan adalah sama ada pembelaan provokasi membahayakan dan tiba-tiba terpakai.

Diputuskan, menolak rayuan dan mengesahkan sabitan dan hukuman Mahkamah Tinggi:

(1) Mahkamah bersetuju dengan penemuan hakim perbicaraan yang bijaksana bahawa berdasarkan keterangan PW4, pendakwaan telah membuktikan bahawa perayu telah melakukan perbuatan yang menyebabkan kematian si mati. Berhubung keterangan PW2 tentang sifat kecederaan yang ditemui pada si mati, hakim perbicaraan yang bijaksana adalah betul dalam memutuskan bahawa perbuatan tersebut telah dilakukan dengan niat menyebabkan kecederaan pada badan yang mana kecederaan itu mencukupi dalam sifat biasa boleh menyebabkan kematian. Selanjutnya, daripada keterangan PW4 yang melihat perayu berulang kali memukul muka si mati dengan batang besi, mahkamah mendapati kecederaan pada si mati adalah kecederaan yang diniatkan

oleh perayu (lihat perenggan 19–20).

(2) Dalam rayuan ini, berdasarkan keterangan PW2 tentang sifat kecederaan yang dialami oleh si mati, hakim perbicaraan yang bijaksana telah membuat penemuan yang betul bahawa kecederaan yang dilakukan ke atas si mati tidak setimpal dengan provokasi, jika ada pun, perayu diprovokasi oleh si mati. Selanjutnya, tiada keterangan mutlak yang dikemukakan oleh perayu berhubung bagaimana dia diprovokasi sehingga hilang kawal diri dan apa yang menyebabkannya melakukan apa yang telah dilakukannya kepada si mati. Oleh demikian, tidak terdapat merit dalam rayuan ini (lihat perenggan 26 & 28).]

Notes

For a case on defence of provocation, see 4(2) *Mallal's Digest* (5th Ed, 2015) para 1806.

Cases referred to

Aziz bin Mat Shah v PP [2010] 4 CLJ 305, CA (refd)
Bala Anak Matik v PP [2006] 3 MLJ 516; [2006] 2 CLJ 229, CA (refd)
Chan Kwee Fong v PP [2010] 1 MLJ 441; [2010] 3 CLJ 671, CA (refd)
Che Omar bin Mohd Akhir v PP [2007] 4 MLJ 309; [2007] 3 CLJ 281, FC (refd)
PP v Megat Shahrizal Megat Shahrur [2011] 5 CLJ 608, CA (refd)

Legislation referred to

Evidence Act 1950 s 105
Penal Code ss 299, 300, 300(c), Exceptions 1, 4

Appeal from: Criminal Trial No 45–15–05 of 2013 (High Court, Seremban)

Viknesvaran (Viknes Ratna & Co) for the appellant.
Farah Ezlin Yusop Khan (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Tengku Maimun JCA (delivering judgment of the court):

[1] The appellant was convicted and sentenced to death by the High Court at Seremban for the following charge:

> Bahawa kamu pada 20 Oktober 2012 jam lebih kurang antara 12.00 tengah hari hingga jam lebih kurang 1.30 petang dalam kebun kelapa sawit Lot 5040, Gate 9, Ladang Kelapa Sawit Felda Bukit Rokan Utara, Peringkat 3, Bahau, dalam Daerah Jempol, di dalam Negeri Sembilan, dengan niat membunuh hingga menyebabkan kematian kepada Mofiz Ali bin Asmot Ali No Passport F 0529925, dengan itu kamu telah melakukan suatu kesalahan di bawah seksyen 302 Kanun Keseksaan dan boleh dihukum di bawah peruntukan yang sama.

[2] Against the conviction and sentence, the appellant appealed to this court. We heard the appeal and had unanimously dismissed the same. We now give our reasons.

THE BACKGROUND FACTS

[3] Briefly, at about noon on 20 October 2002, the appellant and the deceased, both Bangladeshis, were working at Ladang Kelapa Sawit Lot 5040, Gate 9, Ladang Kelapa Sawit, Felda Bukit Rokan Utara, Bahau, Negeri Sembilan. They were loading palm oil fruits onto a lorry. The deceased and the appellant each had an iron loading stick. The appellant was trying to load the fruits onto the lorry when a bunch of fruit fell and knocked the head of the deceased.

[4] A co-worker, Kamal Koshan ('PW4') heard the deceased uttering some unpleasant words to the appellant. Nonetheless he could not ascertain the exact words. A quarrel then ensued between the deceased and the appellant. PW4 saw the appellant hitting the deceased with the iron loading stick on the head. The deceased fell. The appellant continued to hit the deceased numerous times on the face with the iron loading stick. The deceased suffered serious injuries to his face and he died at the scene.

[5] Mohamad Faiz bin Hamid, the lorry driver ('PW5') testified as to the fact that he heard loud argument between the appellant and the deceased. PW5 however could not understand what was being argued.

[6] The pathologist, Dr Mohd Shah bin Mahmood ('PW2') testified that the following injuries were found on the deceased:

1. Luka koyakan luas terbuka (12 x 10sm) di muka. Kecederaan ini melibatkan sebahagian kulit hidung terkoyak, patah tulang hidung, patah remuk tulang muka dan tenggelam bola mata kiri.
2. Luka koyak (33 x 1sm) di pipi kanan dengan patah remuk tulang muka di bawahnya.
3. luka koyak (3 x 1sm, 2 x1sm dan 1 x 1sm) di penjuru kanan mulut.
4. 3 Luka koyak (1.5 x 1sm) di bahagian bawah mulut.
5. Luka koyak (3 x 1sm) di bahagian bawah mulut sebelah kiri.
6. Luka koyak (7 x 1sm) di bahagian dagu. Tulang rahang telah patah menjadi beberapa kepingan.

[7] According to PW2, the injuries sustained by the deceased on the face were grave and serious and he confirmed that the cause of death of the deceased was the serious injuries to the face. PW2 had further stated that the injuries

were due to repeated blunt trauma by a hard object with great force and that death was almost instantaneous or within a few minutes after the trauma.

FINDINGS OF THE TRIAL JUDGE AT THE END OF THE PROSECUTION CASE

[8] At the close of the prosecution case, the learned trial judge considered the elements to be proven by the prosecution for the offence of murder. Taking into account the credibility and evidence of PW4 and the evidence of PW2 as well as PW5, the learned trial judge found that the prosecution had proved the following:

(a) Mofiz Ali (the deceased) had died;

(b) the deceased died as a result of the injuries inflicted by the act of the appellant; and

(c) the act of the appellant is within the categories stated in s 300 of the Penal Code.

[9] Looking at the nature of the injuries as testified by PW2, the learned trial judge found that the appellant had the intention to cause the injuries which caused the death of the deceased, bringing the case under limb (c) of s 300 of the Penal Code which provides:

> Except in the cases hereinafter excepted, culpable homicide is murder —
>
> (c) if it is done with the intention of causing bodily injury to any person, and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death;

[10] The learned trial judge proceeded to consider Exceptions 1 and 4 of s 300 ie on grave and sudden provocation and sudden fight. Her Ladyship found that the appellant had gone overboard in his retaliation against the deceased and that the appellant had acted in a cruel and unusual manner.

[11] Having found that the prosecution had made out a prima facie case and Exceptions 1 and 4 of s 300 of the Penal Code were not applicable, the learned trial judge called upon the appellant to enter his defence.

THE DEFENCE

[12] The defence advanced by the appellant was that he had no intention to kill the deceased and that the death of the deceased was accidental.

[13] In his evidence given under oath, the appellant narrated the events leading to the quarrel. His version was that he and the deceased were having a

break and they were eating bread when the lorry arrived. The appellant wanted to proceed eating but the deceased insisted that the appellant stop eating and at the same time said 'you can eat with your vagina' to the appellant. The appellant responded by telling the deceased not to say unpleasant words during eating and maintained that he will finish his food before he started working. The deceased stood by while the appellant and PW4 finished their food. After the appellant had finished eating, they then continue to load the oil palm fruits.

[14] When the deceased had finished loading the fruits, he accidentally knocked into the appellant. The deceased then said 'Fuck your mother' to which the appellant said 'Why did you say such a thing to me, don't you have a mother and sister'. At that point of time the appellant was still holding the iron stick. The deceased then kicked the appellant's left thigh with great force as a result of which the appellant was pushed backwards. It was then that the iron loading stick with the bunch of fruits fell on the face of the deceased, causing the deceased to fall to the ground. The appellant stated that he could not remember whether the iron stick had hit the face of the deceased. Nevertheless he had also given the version that he may have swung the iron loading stick which may have hit the face of the deceased accidentally.

FINDINGS OF THE TRIAL JUDGE AT THE CONCLUSION THE TRIAL

[15] The appellant's version that a bunch of oil palm fruits fell on the face of the deceased was considered by the learned trial judge in the light of the post-mortem report (exh P19) wherein it was stated that the injuries caused to the face of the deceased were due to repeated blunt trauma. Her Ladyship concluded that the appellant's version of accidental death was not probable having regard to the evidence of the appellant that the fruits hit the deceased while the deceased was standing, whereas the injuries sustained by the deceased were concentrated on the face and there was no injury to the head. The learned trial judge further considered that if the appellant's version was to be believed, then the impact on the face of the deceased would only be once and not multiple grave injuries and broken bones as found by PW2.

[16] As for the defence of grave and sudden provocation, the learned trial judge made a finding of fact that there was no provocation by the deceased and even if there was, the retaliation by the appellant was not proportionate to the provocation.

[17] Consequently, the learned trial judge found that the prosecution had proved its case beyond reasonable doubt. The appellant was thus convicted and sentenced to death.

THE APPEAL

[18] Learned counsel canvassed only one issue before us, namely whether the defence of grave and sudden provocation applies. Although PW4 could not confirm the words used by the deceased against the appellant that had caused the sudden fight, the learned trial judge had made a finding that foul language was used. Learned counsel submitted that the appellant had no intention to kill the deceased and taken together with his conduct post event, where he did not make an attempt to abscond or avoid arrest, this case fell under s 299 of the Penal Code as death was only a likely result.

OUR FINDINGS

[19] Before we proceed to consider whether Exception 1 applies to the instant case, we wish to state that we agreed with the findings of the learned trial judge that from the evidence of PW4, the prosecution had proved that the appellant did the act which caused the death of the deceased. Having regard to the evidence of PW2 on the nature of injuries found on the deceased, the learned trial judge was correct to hold that the said act was done with the intention of causing bodily injury which injuries were sufficient in the ordinary course of nature to cause death.

[20] Further, from the evidence of PW4 who saw the appellant repeatedly hitting the face of the deceased with the iron loading stick, we found that the injuries present on the deceased was the injury that was intended by the appellant (see *Chan Kwee Fong v Public Prosecutor* [2010] 1 MLJ 441; [2010] 3 CLJ 671; *Aziz bin Mat Shah v Public Prosecutor* [2010] 4 CLJ 305; *Public Prosecutor v Megat Shahrizal Megat Shahrur* [2011] 5 CLJ 608).

[21] We move on to consider whether the act of the appellant fell under Exception 1 to s 300 of the Penal Code. Exception 1 reads:

> *Exception 1* — Culpable homicide is not murder if the offender, whilst deprived of the power of self control by grave and sudden provocation, causes the death of the person who gave the provocation, or cause the death of any person by mistake or accident.
>
> The above exception is subject to the following provisos:
>
> (a) that the provocation is not sought or voluntarily provoked by the offender as an excuse for killing or doing harm to any person;
>
> (b) that the provocation is not given by anything done in obedience to the law, or by a public servant in the lawful exercise of the powers of such public servant;
>
> (c) that the provocation is not given by anything done in the lawful exercise of the right of private defence.

Explanation — whether the provocation was grave and sudden enough to prevent the offence from amounting to murder, is a question of fact.

[22] To bring the case under Exception 1 and to avail the defence of grave and sudden provocation, the appellant bears the burden of proof as provided under s 105 of the Evidence Act 1950:

> When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any of the general exceptions in the Penal Code, or within any special exception or proviso contained in any other part of the same Code, or in any law defining the offence, is upon him, and the court shall presume the absence of those circumstances.

[23] We noted that during the prosecution case, the appellant did not put forth the defence of grave and sudden provocation. It was not put to the prosecution witnesses that the appellant hit the deceased because of what the deceased had uttered which had caused the appellant to lose his self-control. What was put to PW4 was self defence, whilst in cross-examination of PW2, the defence put the version that the injury sustained by the deceased was accidental.

[24] Be that as it may, the learned trial judge had considered the defence of grave and sudden provocation where she found that there was no evidence to support the appellant's version that the deceased had uttered the unpleasant words about the appellant's mother. The learned trial judge then concluded as follows:

> The alleged utterance of the deceased of vulgar words towards the deceased (sic) is, firstly, not proven and secondly, against the evidence of PW4 who said that he did not hear such utterance by the deceased.
>
> Even if there were such utterance, it is not sufficient to justify the accused to retaliate by killing the deceased. The act of the deceased (sic) in repeatedly hitting at the face of the deceased when he had fallen to the ground does not commensurate with the provocation of the alleged utterance of such vulgar words, if any. The act of the accused in inflicting the injuries to the deceased is not proportionate to the provocation alleged.

[25] We found no error in the above finding of the learned trial judge. The law is established that in order to successfully set up provocation as a defence for the reduction of the offence of murder to one of culpable homicide not amounting to murder, not only must the accused show that he was provoked into losing his self-control, but the nature of retaliation must be proportionate to the provocation (see *Che Omar bin Mohd Akhir v Public Prosecutor* [2007] 4 MLJ 309; [2007] 3 CLJ 281; *Bala Anak Matik v Public Prosecutor* [2006] 3 MLJ 516; [2006] 2 CLJ 229).

[26] In the instant appeal, from the evidence of PW2 on the nature of injuries sustained by the deceased, we found that the learned trial judge had made a correct finding that the injuries inflicted on the deceased was not proportionate to the provocation, if at all, the appellant was provoked by the deceased. It must be emphasised that there was absolutely no evidence led by the appellant as to how or why he was provoked such that he lost his self-control and what had induced him to do what he did to the deceased.

[27] Bearing in mind that the deceased was already on the ground when the appellant started to hit the deceased's face, we agreed with the learned trial judge that the appellant had taken undue advantage, and causing such multiple and serious injuries to the deceased on the face was cruel and unusual. Such manner of retaliation certainly was not proportionate to all the words uttered by the deceased, even if the version of the appellant was to be accepted.

[28] To conclude, we found no merits in the appeal. The learned trial judge had considered all the evidence in coming to the conclusion that the prosecution had proved its case against the appellant beyond reasonable doubt. There being no appealable error on the part of the learned trial judge as to warrant our appellate intervention, we unanimously dismissed the appeal and we affirmed the conviction and sentence of the High Court.

Appeal dismissed; conviction and sentence of the High Court affirmed.

Reported by Dzulqarnain Ab Fatar